APPENDIX A

United States Court of Appeals,
Ninth Circuit.

DAVID Q. WEBB, Plaintiff-Appellee-Cross-Appellant,

v.

DARRIN SLOAN, ROBERT GUIMONT, ROD BANISTER, Defendants, and CARSON CITY, Defendant-Appellant-Cross-Appellee, and DOES 1-10 inclusive, Defendants,

Nos. 01-16855, 02-16253

Argued and Submitted March 10, 2003.*
Resubmitted April 21, 2003.
Filed May 29, 2003.

Appeals from the United States District Court
for the District of Nevada.
D.C. No. CV-97-00673-ECR.
Edward C. Reed, Jr., District Judge, Presiding.

Before Kozinski, Graber, and Berzon, Circuit Judges.

GRABER, Circuit Judge:

Plaintiff David Q. Webb obtained an $ 80,000 jury verdict in this civil rights action against Carson City, Nevada, after he was prosecuted without probable cause for obstruction of justice. His lawyers were awarded fees. In this opinion, we resolve two appeals: Defendant Carson City's appeal from the

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* This panel unanimously finds case No. 02-16253 suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

adverse verdict, and the separate appeal resulting from a challenge to the fee award by Plaintiff's counsel.

In Carson City's appeal, we hold that deputy district attorneys are final policymakers in Nevada for purposes of establishing municipal liability under 42 U.S.C. § 1983. As a result of our holding, we affirm the jury's verdict.

We reverse and remand on the appeal by Plaintiff's lawyers because the district court applied an incorrect legal standard in computing the fee.[1]

FACTUAL AND PROCEDURAL HISTORY

A. *Facts*[2]

On June 27, 1997, Deputy Darrin Sloan chased a car into the parking lot of the Carson City Inn. At the time of the pursuit, radio traffic identified the owner of the car as Freddy Little. The driver, who was African-American, got out of the car, and Deputy Sloan continued the chase on foot. After leaping over several fences in pursuit, Deputy Sloan lost track of the suspect. He then returned to the abandoned car and began an inventory.

During the next 20 minutes or so, the police received several reports that an African-American man was running through areas near the Inn. Sloan's supervisor, Sergeant Moltz,

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[1] In a separate memorandum disposition, we resolve Plaintiff's cross-appeal, which challenges various rulings by the trial court.

[2] "With respect to those parties in favor of whom the jury returned verdicts, we view the evidence in the light most favorable to each prevailing party." *Gilbrook* v. *City of Westminster*, 177 F.3d 839, 847-48 (9th Cir. 1999). In other words, we view the facts in the light most favorable to Plaintiff as against Carson City, but in the light most favorable to Deputy Sloan as against Plaintiff.

saw an African-American man suddenly jump from some bushes and run through the parking lot of the *Nevada Appeal* newspaper's offices. Shortly thereafter, another officer, Deputy Guimont, found Plaintiff David Q. Webb, an African-American man, lying on the ground behind a vehicle parked in an adjoining parking lot. Deputy Guimont detained Plaintiff at gunpoint and waited for Deputy Sloan's arrival.

Deputy Sloan arrived at the location where Deputy Guimont had detained Plaintiff. He noticed that Plaintiff's clothing did not match that of the man whom he had been chasing, but that Plaintiff did have a similar black bag. Sloan asked Plaintiff, "Why were you driving Freddy Little's car?' Plaintiff responded that he did not know who Freddy Little was. The deputies arrested Plaintiff for various traffic offenses and for obstructing police officers.

On July 3, 1997, another police officer told Sloan that Freddy Little had been bragging that he had outrun the cops on June 27, 1997. Either the next day or the next business day, Sloan informed District Attorney Melanie Bruketta that he no longer believed that Plaintiff was the person whom he had been chasing on June 27. In a supplemental report, Sloan likewise wrote that he no longer believed that Plaintiff was the person who was driving the car that he had been chasing.

Despite Sloan's timely advisement, Plaintiff was not released from jail until July 16. Nor did the district attorney's office drop any of the charges. On August 15, 1997, Plaintiff met with a deputy district attorney, Ray Oster. Oster told Plaintiff that, if he pleaded guilty to the obstruction charge, Oster would drop the traffic charges. Plaintiff refused. A week later, the district attorney's office dropped the traffic charges anyhow but proceeded with the obstruction charge.

Chief Deputy District Attorney Anne Langer took over prosecution of the obstruction charge. On September 3, 1997,

Langer offered to drop the obstruction charge if Plaintiff signed a waiver of civil liability. Plaintiff again refused. In a later chance meeting, Langer assured Plaintiff that she would prosecute him to conviction on the obstruction charge. Plaintiff later testified that Langer had told his lawyer that she was prosecuting him because he refused to sign the waiver.

In October of 1997, Plaintiff went to trial on the obstruction charge. At the trial, Deputy Sloan testified that Plaintiff had done nothing to delay him in performing his duties. Deputy Guimont similarly testified that Plaintiff had not obstructed the police. Plaintiff was acquitted.

B. *Procedural History*

Shortly after his acquittal, Plaintiff filed a complaint containing nine claims for relief under both federal and state law.[3] Defendants moved for dismissal or, in the alternative, for summary judgment. The motion was denied for all claims but one. Defendants appealed, seeking review on the issue of qualified immunity. Plaintiff responded to the appeal and filed a motion to certify the appeal as frivolous. The district court denied certification, and this court dismissed the appeal for lack

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[3] Against all Defendants, Plaintiff alleged (1) a violation of his First Amendment right to seek redress from the courts, due to Langer's offer to drop the charges in exchange for a waiver of all civil claims; (2) a violation of the Fourth Amendment's prohibition against unlawful seizure, due to his arrest, imprisonment, and subsequent prosecution; (3) a general violation of Plaintiff's civil rights caused by Defendants' initiation and pursuit of prosecution without probable cause; (4) a conspiracy to commit those federal civil rights violations; (5) false arrest, abuse of process, and malicious prosecution under state tort law; (6) intentional infliction of emotional distress; (7) a claim for "declaratory relief"; and (8) a general due process violation. Against Defendants Banister and Carson City, Plaintiff alleged a failure to train officers.

of jurisdiction. Plaintiff's motion for interim fees was also denied.

Plaintiff then moved for summary judgment, which was denied. The case proceeded to trial when settlement efforts failed.

The jury found in favor of Deputy Sloan on all counts, but in favor of the Plaintiff as against Carson City. In special interrogatories, the jury found that Defendant Carson City had a custom, policy, or practice that violated Plaintiff's federal constitutional right not to be prosecuted without probable cause, and that Carson City has a "custom, policy, or practice to falsely imprison individuals." The jury found that Deputy Sloan did not falsely arrest Plaintiff but that Carson City falsely imprisoned, maliciously prosecuted, and committed abuse of process against Plaintiff under state law. The jury awarded Plaintiff $80,000 without apportionment among the separate claims.

Plaintiff's counsel, the law firm of Cooke Story, Ltd., moved for an award of attorney fees in the amount of $188,115.66. The district court awarded fees but determined that the total amount should be $ 95,507.25: $ 78,450 for work performed by Cooke Story and $ 17,057 for work performed by Plaintiff's previous lawyer, Terri Keyser-Cooper.

Carson City timely appeals the decision that municipal liability may attach for the actions of deputy district attorneys. Carson City also argues that it enjoys sovereign immunity for the discretionary decisions of district attorneys under Nevada Revised Statute ("NRS") § 41.032(2).

Cooke Story timely appeals the district court's decision to award a lower fee than it requested. Keyser-Cooper does not appeal her portion of the fee award, however.

DISCUSSION

A. *Municipal liability under § 1983 is proper in this case because the deputy district attorneys were acting as final policymakers for Carson City in deciding whether to prosecute Plaintiff.*[4]

1. *There are two ways to establish municipal liability under § 1983, in addition to express adoption of an unconstitutional policy.*

Section 1983 provides that "[e]very person who, under color of [law], subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . or other proper proceeding for redress." 42 U.S.C. § 1983. "Congress intended the term 'person' to include municipalities," such as Carson City. *Christie v. Iopa*, 176 F.3d 1231, 1234 (9th Cir. 1999).

Nevertheless, municipal liability under § 1983 cannot be founded on a theory of respondeat superior. *Gibson* v. *County of Washoe*, 290 F.3d 1175, 1185 (9th Cir. 2002), cert. denied, 154 L. Ed. 2d 775, 123 S. Ct. 872 (2003). "Congress intended to hold municipalities liable only when 'action pursuant to official municipal policy of some nature caused a constitutional tort.'" *Christie,* 176 F.3d at 1235 (quoting *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)). Generally, then, the actions of individual employees can support liability against a municipality under § 1983 only if those employees were acting pursuant to an official municipal policy. *See Pembaur* v. *City of Cincinnati,* 475 U.S. 469, 479, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986)

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[4] We review de novo a district court's decision to deny immunity to a municipality in a § 1983 action. *Cortez* v. *County of L.A.*, 294 F.3d 1186, 1188 (9th Cir. 2002).

(stating that "the 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality").

As we explained in *Christie*, a municipality still may be liable even if it does not expressly adopt the alleged policy. 176 F.3d at 1235. There are two alternative ways such liability can attach. First, if an employee commits a constitutional violation pursuant to a long-standing practice or custom, the employee's act is sufficient to support municipal liability. *Id.* By contrast, "[a] single constitutional deprivation ordinarily is insufficient to establish a longstanding practice or custom." *Id.* A municipality can be liable even for an isolated constitutional violation, however, when the person causing the violation has final policymaking authority. *Id.*

As to the first alternative, Plaintiff must prove the existence of a longstanding practice or policy to the satisfaction of the fact-finder. *Trevino* v. *Gates,* 99 F.3d 911, 920 (9th Cir. 1996) ("Normally, the question of whether a policy or custom exists would be a jury question."). On the other hand, when the issue concerns a single constitutional deprivation under the second alternative, the court must decide, as a matter of state law and before the case may be submitted to the jury, whether the person who committed the violation had final policymaking authority. *Christie,* 176 F.3d at 1235.

Plaintiff argues that he proved *both* that Carson City had a longstanding practice or custom of incarcerating and prosecuting people it knows to be innocent *and* that municipal liability is proper in this case because the deputy district attorneys were acting with final policymaking authority. Because we agree with the second argument, a question that we previously left open, *Herb Hallman Chevrolet, Inc.* v. *Nash-Holmes,* 169 F.3d 636, 645 (9th Cir. 1999), we need not reach the first.

2. *Deputy district attorneys in Nevada have final policymaking authority for the municipality.*

In Nevada, the legislature confers final policymaking authority on principal prosecutors and confers that *same* authority directly on deputies. NRS § 252.070(1) provides: "All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals."

By its plain text, that statute confers authority on deputy district attorneys that is coextensive with the authority enjoyed by principal district attorneys. Thus, if principal district attorneys are final policymakers, then so are their deputies.

Whether the principal prosecutor has final policymaking authority is easily resolved. The Nevada Constitution does not create the office of the district attorney. *Lane* v. *Second Judicial Dist. Court,* 104 Nev. 427, 760 P.2d 1245, 1251 (Nev. 1988). Rather, the state's constitution confers the power to do so on the legislature. Nev. Const. art. 4, § 32. Pursuant to that power, the legislature statutorily created the office and prescribed its duties. *Lane,* 760 P.2d at 1251; Nev. Rev. Stat. § 252.110. The Nevada Supreme Court has noted that "the matter of the prosecution of any criminal case is within the *entire control* of the district attorney." *Cairns* v. *Sheriff, Clark County,* 89 Nev. 113, 508 P.2d 1015, 1017 (Nev. 1973) (per curiam) (emphasis added). Thus, in Nevada, principal district attorneys "are final policymakers for the local government in a particular area, or on a particular issue." *McMillian* v. *Monroe County,* 520 U.S. 781, 785, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997). Specifically, Nevada district attorneys are final policymakers in the particular area or particular issue relevant here: the decision to continue to imprison and to prosecute.

The state attorney general exercises *supervisory* power over county district attorneys, but this does not remove final

policymaking authority even from principal district attorneys. As pertinent here, NRS § 228.120(2) provides that the attorney general *may*:

> Exercise supervisory powers over all district attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge.

Both this court and the Nevada Supreme Court, however, have emphasized the discretionary and permissive nature of that authority. "The power to 'supervise' a district attorney which is granted to the attorney general by NRS 228.120(2), means supervision and cannot sensibly be read as a grant of power to usurp the function of the district attorney." *Ryan* v. *Eighth Judicial Dist. Court,* 88 Nev. 638, 503 P.2d 842, 844 (Nev. 1972). "'The tenor of these statutory provisions is that with respect to the general run of prosecutions in the various counties of Nevada the attorney general of Nevada has no duties and responsibilities. His authority concerning supervision of district attorneys is permissive and discretionary.'" *Houston* v. *Bryan,* 725 F.2d 516, 519 (9th Cir. 1984) (quoting with approval the district court's decision below). In the light of these authorities, and in the absence of any evidence in the record that the attorney general in fact ever exercises that supervisory power, we hold that principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions.

As previously stated, the Nevada legislature confers the same final policymaking authority on deputy district attorneys. Nev. Rev. Stat. § 252.070(1). The principal does not delegate constrained discretion to a deputy upon appointment. Rather, the legislature states that, upon appointment, deputies may transact all official duties *to the same extent as* their principals.

We are mindful that the Nevada statutory text is permissive, not mandatory: Deputies *may* transact official business to the same extent as their principals. Conceivably, the principal prosecutor could constrain that authority. That possibility does not change our analysis, because Carson City presented no evidence that its principal district attorney actually has constrained the deputies' authority. In fact, Carson City presented evidence to the contrary.

In *Christie*, we held that deputy prosecutors in Hawaii did not have final policymaking authority, a holding on which Carson City relies. 176 F.3d at 1237-38. That case is distinguishable in fundamental ways, however.

There, it was clear that the chief prosecutor had final policymaking authority. *Id.* at 1238. The Hawaii charter gave principal prosecutors the authority to appoint deputies, but did not describe the authority that those deputies would enjoy to make decisions or to choose among alternatives. *Id.* at 1237.

Accordingly, *Christie* framed the question as whether the chief prosecutor had delegated that authority to deputy prosecutors. *Id.* at 1236. That was a hard question, because to avoid imposing respondeat superior liability we had to ascertain the precise degree to which a principal delegates authority. *Id.* Here, however, the legislature directly delegates coextensive authority to the principal prosecutor and the deputies.

In *Christie*, we found it significant that "if [the deputy prosecutor] disagreed with [the principal prosecutor's] decision to prosecute Plaintiffs, she had to contact [the principal prosecutor]; she could not decide unilaterally to drop the case." *Id.* at 1238. By contrast, Carson City presented affirmative evidence that any deputy in the office could have made the decision to dismiss the charges against Plaintiff without consulting with any supervisor.

Because of the distinctions between Nevada's deputy district attorneys and the Hawaiian deputy prosecutors in *Christie*, *Christie* does not control the outcome of this case. The district court correctly held that deputy district attorneys in Nevada are final policymakers whose actions can be the acts of the municipality for the purposes of attaching liability under § 1983.[5]

B. *We need not reach Carson City's state-law immunity claim because the verdict can rest on a valid federal ground.*

Citing NRS § 41.032(2), Carson City argues that deputy district attorneys enjoy immunity for their discretionary acts. We need not reach this issue. If the immunity defense is viable, then the state claims were submitted to the jury in error. The federal claims, however, remained valid.

Sometimes, a jury's verdict may stand on a legally viable theory even if a legally defective theory also was presented. As explained in *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 62 F.3d 280, 285-86 (9th Cir. 1995):

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[5] The Nevada Public Agency Insurance Pool, as amicus, argues that this holding will expose Nevada's municipalities to heavy liability. The same statutory text gives co-extensive authority to deputy county recorders, deputy county clerks, and deputy county assessors. We are not persuaded that our holding will have the crushing effect that amicus urges. First, our holding does not address whether the principals who hold those other positions are final policymakers for municipalities. If a county recorder is not a final policymaker, then a deputy county recorder exercising coextensive authority is not a final policymaker. Second, it is within the Nevada legislature's power to constrain the authority of deputies if it should see fit.

> Our analysis of the viability of the plaintiff's theories . . . leaves us with a situation in which one of the theories submitted to the jury was legally defective. "As a general rule, 'a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury.'" *Kern* v. *Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990) (quoting *Syufy Enters.* v. *American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986), cert. denied, 479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876, and cert. denied, 479 U.S. 1034, 93 L. Ed. 2d 838, 107 S. Ct. 884 (1987)). An exception to this rule exists, however, when we are able to construe a general verdict as attributable to a theory submitted to the jury that was viable . . . . In deciding whether to exercise this discretion, the factors we consider are: "(1) the potential for confusion of the jury; (2) whether the losing party's defenses apply to the count upon which the verdict is being sustained; (3) the strength of the evidence supporting the count relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to the various legal theories." *Id.* (citing *Traver* v. *Meshriy*, 627 F.2d 934, 938-39 (9th Cir. 1980)).

(Parallel citations omitted.)

A consideration of the relevant factors in this case weighs in favor of affirming the full jury award on federal grounds:

First, the verdict eliminates any concern about jury confusion. Instead of the general verdict entered in *Portland Feminist*, the jury answered special interrogatories explaining on which theories it found in Plaintiff's favor and on which it did not. The special interrogatories identify which answers refer to the federal claims and which refer to the state claims.

Because of the special interrogatories, there is no danger that the jury found liability *only* on a legally defective theory. The only aspect of the verdict that is "general" is the damages award, which was not apportioned among the claims.

Second, the defense of sovereign immunity under NRS § 41.032(2) applies only to the state-law claims, not the federal claims. Thus, there is a clear delineation between the legally viable theories and the theories that we assume to be legally infirm.

The third and fourth factors are related, and both weigh in favor of affirming the full award. The evidence is certainly strong enough to support the jury's reasonable damages award based solely on the federal claims. Furthermore, the evidence supporting the federal and state claims was the same. The state claims were simply another means of seeking redress for the same injuries that arose out of the same common core of facts.

Application of these four factors persuades us that the verdict here is distinguishable from the one in *Portland Feminist*. The special interrogatories provide a sufficient record to allow us to affirm the verdict even if Nevada can claim immunity for the state-law claims.

C. *The district court applied an incorrect legal standard and, as a consequence, excluded related claims in computing the fee.*[6]

Under 42 U.S.C. § 1988, the district court may, in its discretion, award attorney fees to a prevailing party in an action brought under § 1983. The district court agreed that Plaintiff was a prevailing party, but awarded less than Cooke Story had

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[6] We review for abuse of discretion a district court's decision to award fees to a prevailing party in a civil rights action. *Hensley* v. *Eckerhart,* 461 U.S. 424, 437, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).

requested. The court reduced the fee award for three reasons. *First*, it excluded time spent on three motions that Plaintiff did not win: a motion to certify as frivolous Defendants' interlocutory appeal of the court's qualified immunity decision, a motion for interim fees, and a motion for partial summary judgment. *Second*, the court reduced the number of hours by 25 percent to reflect Plaintiff's limited success. Third, after concluding that counsel spent too much time challenging Defendants' interlocutory appeal, the court reduced the number of hours for which fees would be awarded on that issue. Although the district court did not err in applying the second step in *Hensley* v. *Eckerhart,* 461 U.S. 424, 440, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983), when it made the second and third adjustments, *see infra* p. 7104, we reverse and remand the fee award because the district court used an incorrect legal standard in deciding what issues were "unrelated" to the successful claims.

The extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees" under § 1988. *Hensley, 461 U.S. at 440.* As we explained in *Sorenson* v. *Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001), there is a two-step process for determining the appropriate reduction for "limited success":

> The first step is to consider whether "the plaintiff failed to prevail on claims that were unrelated to the claims on which he succeeded." [*Hensley,* 461 U.S.] at 434. Claims are "unrelated" if they are "entirely distinct and separate" from the claims on which the plaintiff prevailed. *Odima* [v. *Westin Tucson Hotel,* 53 F.3d 1484, 1499 (9th Cir. 1995)]. Hours expended on unrelated, unsuccessful claims should not be included in an award of fees.
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> . . .
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> The second step of the *Hensley* analysis is to consider whether "the plaintiff achieved a level of success that

> makes the hours reasonably expended a satisfactory basis for making a fee award." [461 U.S.] at 434. In answering that question, a district court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee."
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> *Id.* A plaintiff may obtain excellent results without receiving all the relief requested. *Id.* at 435 n.11.

(Parallel citations omitted.) The district court reduced the Plaintiff's fee at both steps of this two-step analysis.

At the first step, the court determined which claims had succeeded and which claims had failed. The court noted that Plaintiff was unsuccessful on his claims for false arrest and failure to train. The court nonetheless allowed fees for work done on those two claims because it found them related to the claims on which Plaintiff did prevail. In this respect, the court did not err.

The court also relied on the fact that "Plaintiff was unsuccessful on his motion to certify the appeal as frivolous, his claim for interim attorney's fees, and his motion for summary judgment." The court deducted the hours that Cooke Story claimed were spent preparing for those portions of the case. The court erred in analyzing whether those three motions were "unrelated" to the claims on which Plaintiff ultimately prevailed.

The district court erred because it misconstrued our precedents when it applied a strict two-step test -- (1) are there common facts *and* (2) are there related legal theories -- to determine the relatedness of claims. We do apply a two-step test to determine how to reduce an award for limited success,

but we have not adopted a similar test for relatedness. Echoing the Supreme Court's description of related-claim cases, we have said that related claims involve a common core of facts *or* are based on related legal theories. *Hensley,* 461 U.S. at 435; *Cabrales* v. *County of L.A.,* 864 F.2d 1454, 1465 (9th Cir. 1988), *vacated*, 490 U.S. 1087, 104 L. Ed. 2d 982, 109 S. Ct. 2425 (1989), and *reinstated*, 886 F.2d 235 (9th Cir. 1989). Often, related claims involve both a common core of facts and related legal theories. *See, e.g., Sorenson,* 239 F.3d at 1147. However, contrary to the district court's understanding, we have not *required* commonality of both facts *and* law before concluding that unsuccessful and successful claims are related.

In *Schwarz* v. *Secretary of Health & Human Services,* 73 F.3d 895, 902-03 (9th Cir. 1995), we examined our cases concerning "relatedness" in fee awards. We acknowledged that the test for relatedness of claims is not precise. *Id.* at 903. However, we offered some guidance, explaining that "the focus is to be on whether the unsuccessful and successful claims arose out of the same 'course of conduct.' If they didn't, they are unrelated under *Hensley*." *Id.* We explained that claims are *unrelated* if the successful and unsuccessful claims are "distinctly different" *both* legally *and* factually. *Id.* at 901, 902. Again echoing *Hensley*, we reasoned that such hours are excludable because work on such distinctly different claims "cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Id.* at 901 (quoting *Hensley,* 461 U.S. at 435 (internal quotation marks omitted)). We cited cases in which we asked "whether it is likely that some of the work performed in connection with the unsuccessful claim also aided the work done on the merits of the successful claim." *Id.* at 903 (brackets and internal quotation marks omitted). Ultimately, however, we reaffirmed that the focus is on whether the claims arose out of a common course of conduct. *Id.* In short, claims may be related if either the facts *or* the legal theories are the same.

Plaintiff asserted numerous legal theories against several defendants. However, all his claims arose out of a common core of facts and a common course of conduct: Plaintiff's arrest, detention, and prosecution. In such a situation, we cannot say that the claims the district court excluded were "entirely distinct and separate" from the successful claims. *Sorenson,* 239 F.3d at 1147 (internal quotation marks omitted).

For example, Plaintiff's motion for summary judgment, although unsuccessful, was not wholly unrelated to the claims on which he succeeded. Plaintiff sought summary judgment on his federal and state claims for false arrest, false imprisonment, and malicious prosecution. Plaintiff ultimately prevailed on his false imprisonment and malicious prosecution claims. As the district court itself concluded, the claim for false arrest is unquestionably related to the two successful claims. Even though the summary judgment motion failed, work done to prepare the motion on those theories could have contributed to the final result achieved. In other words, the district court should not have excluded all work on the motion on the ground that it was "unrelated."

To be sure, at least one claim in the summary judgment motion asserted a separate legal theory that was not tied to the facts. Plaintiff claimed that the obstruction statute facially violated the *First Amendment* because of its overbreadth. The hours spent preparing that claim properly may be excluded. However, the district court should exclude the hours spent on that claim only if those hours can be isolated. *Hensley* recognized that work on different aspects of a case often overlaps, and that "much of counsel's time will be devoted generally to the litigation as a whole." 461 U.S. at 435. If it is impossible to isolate the truly unrelated claims from those related claims, the district court should instead reflect that limited success in *Hensley*'s second step: the significance of the overall relief in relation to the hours reasonably expended on the litigation. *Sorenson,* 239 F.3d at 1147.

As for *Hensley's* second step, the district court applied the proper analysis. Plaintiff initially sued several defendants, but prevailed against only one: Carson City. A discretionary reduction to reflect that kind of limited success is appropriate. *See Corder* v. *Gates,* 947 F.2d 374, 379-80 (9th Cir. 1991) (stating that a full-fee award to a plaintiff who prevails against only one among many defendants encourages litigation in a manner that Congress did not intend).

In addition, on the ground that the billing was excessive, the court reduced by half the 71.5 hours that Cooke Story claimed it took to prepare a motion to dismiss Defendants' interlocutory appeal. This was the same appeal that Cooke Story claimed below should be certified as frivolous. The district court apparently agreed that the issue demanded little of counsel's time. The court did not abuse its discretion in making this reduction.

We recognize that a reduction in the requested fees is appropriate in view of Plaintiff's limited success and the court's conclusion that some of the hours billed were excessive. Because the district court applied the wrong standard for relatedness, however, we must reverse and remand so that the court may reexamine Cooke Story's fee application in view of the correct legal standard.[7]

AFFIRMED in case No. 01-16855. REVERSED and REMANDED in case No. 02-16253.

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[7] We note again that Keyser-Cooper does not appeal her portion of the fee award, so that award should remain unchanged.

APPENDIX B

United States Court of Appeals,
Ninth Circuit.

DAVID Q. WEBB, Plaintiff--Appellant,
v.
DARRIN SLOAN; ROBERT GUIMONT; ROD BANISTER; CARSON CITY; and DOES 1-10 inclusive,
Defendants--Appellees.
No. 01-16969.

Submitted March 10, 2003.*

Resubmitted April 21, 2003.
Decided May 29, 2003.

Appeal from the United States District Court for the District of Nevada, Edward C. Reed, Jr., District Judge, Presiding.
D.C. No. CV-97-00673-ECR.

Before: KOZINSKI, GRABER, and BERZON, Circuit Judges.

MEMORANDUM**

Plaintiff David Q. Webb obtained an $80,000 jury verdict in this civil rights action against Carson City, Nevada, after he was prosecuted without probable cause for obstruction of justice. Defendant Carson City appealed in case No.

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* This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

01-16855; Plaintiff cross-appealed, filing a pro se brief that alleges 12 claims of error. We resolved Carson City's claims in a separate published opinion.

Plaintiff's first claim alleges unlawful arrest. Construing this allegation either as a challenge to the jury's verdict in favor of Deputy Sloan, or as a challenge to the district court's ruling on the Rule 50(a) motion in favor of Carson City, it must fail.

Plaintiff's version of the arrest and Deputy Sloan's version of the arrest conflicted. The jury accepted Deputy Sloan's version of events, which was supported by substantial evidence. *See Hines* v. *Gomez,* 108 F.3d 265, 267 (9th Cir.1997) (stating standard of review).

Similarly, the district court correctly granted the Rule 50(a) motion on behalf of Carson City on the theory that municipal liability could not attach for the isolated action of a police officer in the field. Plaintiff presented no evidence to show that street patrol officers are final policymakers for the municipality. The district court's directed verdict was proper because no reasonable jury could have found for Plaintiff with respect to that issue. *See Montiel* v. *City of L.A.,* 2 F.3d 335, 342 (9th Cir.1993) (stating standard of review).

The next claim of error is that Defendants falsely imprisoned Plaintiff despite their knowledge of the true suspect. This claim cannot support reversal, because Plaintiff prevailed on this claim at trial.

Next, Plaintiff argues about intentional infliction of emotional distress. Plaintiff conceded below that Defendants were entitled to judgment as a matter of law on this issue. Therefore, he may not revive the claim on appeal.

The remaining arguments concern mistakes allegedly made by Plaintiff's counsel below. Plaintiff did not object to

any of those acts at trial and so has waived them. *Doi* v. *Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir.2002). In any event, in this civil case Plaintiff is bound by the alleged errors and omissions of his own counsel. *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). Plaintiff has no right to counsel in this § 1983 action; thus, he has no right to effective counsel. *Nicholson* v. *Rushen*, 767 F.2d 1426, 1427 (9th Cir.1985) (per curiam).[1]

AFFIRMED.

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[1] We note, however, that the verdict in Plaintiff's favor seems evidence enough that in fact he had effective counsel despite his complaints.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAVID Q. WEBB,	)
	)
Plaintiff,	)
	) Case No. CV-N-97-763-
	) ECR (PHA)
v.	)
	) MEMORANDUM
DARRIN SLOAN, et al.,	) DECISION AND
	) ORDER
Defendants.	)
	)

This matter is before the Court on Defendants' Motion to Dismiss or In The Alternative, For Summary Judgment (Doc. #18). The Plaintiff, David Webb, appearing pro se, has opposed the motion (Doc. #32) and the Defendants have replied (Doc. #33). The motion is ripe for decision.

BACKGROUND

This action was initiated by Webb who was then represented by counsel. Webb was arrested on the evening of June 27, 1997, and charged with obstructing officers and various misdemeanor traffic violations. According to the complaint, Deputy Sheriff Darrin Sloan was in hot pursuit of a vehicle driven recklessly by Freddie Little. Little was apparently identified as the suspect on a dispatch tape of the pursuit. Both Webb and Little are African-American males. At about 9:00 p.m., the approximate time of the pursuit, Webb was walking along a street in Carson City when he observed six to eight uniformed deputies approaching with weapons drawn as evidenced by red laser beams shining on the side of a nearby

building. Webb was frightened by this development and ducked down to avoid being shot. When the deputies came upon Webb, they ordered him to come forward and placed him under arrest, handcuffing him. When Webb asked why he was being arrested, he was directed to "shut up."

While he was being arrested, Webb contends that another officer informed defendant Deputy Guimont that he was not the right man. It is alleged by the plaintiff that the real suspect. Freddie Little, had been arrested several times in Carson City and was well known to the defendants. When asked by the deputies if he knew Little, Webb said he did not. Webb was taken to the Carson City jail and booked on misdemeanor charges of reckless driving, driving with no valid driver's license, no proof of insurance, and obstructing officers in the performance of their duties. With bail set at $1700, Webb, who is unemployed, remained in jail. He was arraigned on June 30, pleaded not guilty and was denied release on his own recognizance (OR).

Three days later, on July 3, 1997, defendant Deputy Sloan filed a continuation report stating that he did not believe that Webb was the driver of the vehicle Sloan had been chasing on June 27. This report was made on the basis of an informant's report that Freddie Little was bragging around town that he had eluded the deputies on the evening of Webb's arrest. Webb remained in jail. Nearly two weeks later, Webb was finally released on an OR but the charges remained against him. Nearly one month later, on August 15,1997, a deputy district attorney met with Webb offering to dismiss the traffic charges if Webb would plead guilt to the obstruction charge. Webb declined the offer. On August 22, 1997 the traffic charges were dismissed "in the interests of justice." The obstructing charge remained.

According to the complaint, on September 2, 1997, Webb's attorney conveyed an offer made by Chief Criminal

Deputy District Attorney Anne Langer, wherein she agreed to dismiss the obstruction charge if Webb would sign a waiver of his right to sue the defendants in a civil action. Allegedly, Langer insisted that if Webb refused the deal, prosecution of the obstructing charge would be vigorous and aggressive. Webb again declined the D.A.'s terms. After several continuances, on October 30,1997, Webb was tried and acquitted on the obstruction charge. He filed this action a month later.

Procedural History

The Complaint in this action was filed November 26, 1997 naming the individual defendants in both their personal and official capacities. It sets out claims under the First Amendment for unlawful prosecution in retaliation for Webb's refusal to waive his right to "protest official misconduct," and the Fourth Amendment for unlawful seizure by conducting an unreasonable and insufficient detention, search, and investigation, by providing false, misleading, or incomplete information in official or court proceedings, and by failing to provide exculpatory information to the prosecuting attorney. Webb also contends his civil rights were violated by Defendants' initiation and pursuit of prosecution without probable cause. He claims Defendants Banister and Carson City are liable for their failure to properly train the arresting deputies; alleging a policy or practice in this regard. Webb finally alleges a conspiracy among the defendants in violation of federal statutes, along with three additional claims founded on state law, invoking this Court's pendent jurisdiction.

In February, 1998, the defendants answered and a joint stipulated discovery plan was filed in April, which was granted with modification by the Court. Thereafter, the Court granted a 60 day extension for discovery to December 9, 1998. One month prior to the close of discovery, Webb's counsel moved to withdraw citing an irreparable breakdown of communication. The motion was granted and thereafter Webb appeared pro se.

A pre-trial notice order was entered on February 4,1999. Defendants then moved for permission to extend the deadline for dispositive motions, citing Webb's failure to respond to discovery and asserting that uncontroverted facts were present to support a motion to dismiss. The extension was granted and the defendants' Motion to Dismiss or In The Alternative For Summary Judgment (Doc #18) was filed in February 1999. Following numerous letters from Webb to the Court seeking a stay of the action and then extensions of time to respond, Webb finally provided the Court with a letter which was construed as a response to the motion to dismiss and it filed as such on June 29, 1999, (Doc #32).

DISCUSSION

The defendants seek dismissal of the complaint on the basis of a failure to prosecute or because Webb fails to state a claim. Alternatively, they seek summary judgment either on the merits or based on qualified immunity for the deputies' discretionary acts. The motion is accompanied by three exhibits including Deputy Sloan's answers to interrogatories, a copy of a computer generated docket of Webb's criminal matter, and another computer generated document showing Webb's release from jail. The response filed by Webb is his sworn statement of "the actual events that took place on Friday, 27 June 1997:"

LEGAL STANDARDS

The Motion to Dismiss

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, all material allegations in the complaint are accepted as true and are to be construed in the light most favorable to the nonmoving party: *Russell* v. *Landrieu,* 621 F.2d 1037 (9th Cir. 1980). A dismissal under Fed. R. Civ. P. 12(b)(6) is essentially a ruling on. a question of law. *North Star Inter'l* v. *Arizona Corp. Comm.,* 720 F.2d 578

(9th Cir. 1983). For a defendant-movant to succeed, it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proven under the allegations of the complaint. *Halet* v. *Wand Investment* Co., 672 F.2d 1305 (9th Cir. 1982).

Defendants argue that Webb's complaint should be dismissed for failure to prosecute the action contending that Webb failed to provide any response to discovery requests they propounded and that he is in violation of the Federal Rules of Civil Procedure 41(b) and Local Rules of Practice 41-1, which allows for dismissal if a matter is pending for more than nine months without "any proceeding of record having been taken." This particular argument is not persuasive since a review of the docket sheet shows regular activity in the matter, even after the withdrawal of Webb's attorney. Defendants argue that Webb has done nothing of substance in pursuing his case since the filing of the joint discovery plan in April 1998. It seems disingenuous for Defendants to make this argument since they were participants in the various stipulated extensions filed between April, 1998 and November, 1998. Additionally, Defendants have made no apparent efforts to enforce Webb's cooperation in responding to Discovery requests and even they missed the deadline for filing dispositive motions, thereafter seeking leave of the Court to file the instant motion.

The defendants' argument under rule 12(b)(6) also fails for two reasons. First, Webb's allegations, taken as true and in a light most favorable to him, clearly state claims upon which relief could be granted. Second, Defendants' motion relies heavily on matters outside the pleadings, including the answers to interrogatories made by defendant Sloan to support their view of the facts. Their reliance on other evidence and on the summary judgment standards in their remaining arguments and the Court's consideration thereof foreclose a simple dismissal.

Summary Judgment

In the face of a motion for summary judgment, the allegations of the complaint are again viewed in a light most favorable to the plaintiff, *Adickes* v. *S .H. Kress and Co.,* 398 U.S. 144, 157 (1970), and it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven under the allegations of the complaint. *Halet* v. *Wand Investment Co.*, 672 F.2d 1305 (9th Cir. 1982). Summary judgment is proper "if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56.

Defendants' motion asserts that they should prevail as a matter of law because "it is undisputed that" (1) the deputies were authorized by law to arrest Webb; (2) the deputies had legal cause to arrest Webb; (3) the deputies had probable cause to arrest Webb, defeating any constitutional claim he makes; and (4) the deputies are entitled to qualified immunity irrespective of the presence of probable cause. Additionally, they assert that there is no evidence to support the claim that Carson Cite is liable based on a custom or policy regarding the training of the deputies. And finally, Defendants suggest that all the remaining claims are based on state law and should be dismissed in light of Webb's inadequate federal claims and on the basis of sovereign immunity. Even in the face of these arguments, summary judgment shall not be granted on all claims.

In their motion, Defendants argue the facts are undisputed. Once the movant presents evidence which, *if uncontroverted,* would entitle them to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). There is no

genuine issue of material fact if the party opposing the motion 'fails to make an adequate showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Taylor* v. *List,* 880 F.2d 1040,1045 (9th Cir. 1989) *quoting Celotex Corp.* v. *Catrett,* 477 U.S. 317, 322 (1986). Following numerous continuances to accommodate his attempts to obtain counsel, Webb provided the Court with a statement sworn to be true and setting out what transpired on the evening of June 27,1997, and thereafter until his trial on October 30,1997. His statement contains no legal citation or points and authorities as required by the local rules of practice (and noted by Defendants in their reply as a basis for granting their motion). It is not supported by independent documentation or other evidence, although Webb suggests that affidavits from various named witnesses would support him. In the spirit of liberal construction required for pro se litigants, the response can be taken as intended and the mentioned technical inadequacies may be overlooked. *Haines* v. *Kerner,* 404 U.S. 519 (1972) (per curiam).

THE CLAIMS FOR RELIEF

Retaliatory Prosecution

The right of access to the courts is subsumed under the First Amendment right to petition the government for redress of grievances. *See, e. g, California Motor Transp. Co.* v. *Trucking Unltd.* 404 U.S. 508, 510 (1972); *Harrison* v. *Springdale Water & Sewer Comm'n,* 780 F.2d 1422,1427 (8th Cir. 1986). Deliberate retaliation by state actors against an individual's exercise of this right is actionable under § 1983. *Franco* v. *Kelly,* 854 F.2d 584, 589 (2d Cir. 1988) (intentional obstruction of the right to seek redress "is precisely the sort of oppression that ... section 1983 [is] intended to remedy") (quoting *Morello* v. *James,* 810 F.2d 344, 347 (2d Cir. 1987) (brackets in original)); *Harrison,* 780 F.2d at 1428. And, an action taken by

a prison official against an inmate in retaliation for the use of the prison's grievance process violates that inmate's First Amendment rights. *Thomas* v. *Carpenter,* 881 F.2d 828, 829 (9th Cir. 1989), *cert. denied,* 494 U.S. 1028 (1990); *Soranno's Gasco, Inc.* v. *Morgan,* 874 F.2d 1310, 1314 (9th Cir. 1989); *Rizzo* v. *Dawson,* 778 F.2d 527, 531-32 (9th Cir. 1985). Thus, Webb's first claim for relief alleging that he was prosecuted in retaliation for his refusal to waive his right to sue these defendants for violating his rights states a claim under § 1983.

This claim is not specifically addressed by Defendants in their motion. In fact, they do not acknowledge such a claim has been made. Webb however, sets out facts to support the claim in the "Points of Interest" portion of his opposition. He provides the date his attorney conveyed the offer made by Deputy District Attorney Anne Langer and the specific conditions attached to the offer. As discussed more thoroughly below at footnote 3, Langer enjoys prosecutorial immunity and is not a named defendant in this action, however, under certain circumstances her actions may be sufficient to hold Carson City liable. Because no motion is made in regards to this claim, it survives.[2]

Unlawful Seizure

Webb's second claim for relief is that Defendants violated his Fourth and Fourteenth Amendment rights when they conducted an objectively unreasonable detention, search,

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[2] Even absent a cross-motion, the Court may. upon notice to the opponent, grant summary judgment for either party *site sponte. Celotex Corp.* v. *Catrett,* 477 U.S.17, 317, 326 (1986). The fact that the defendants do not address this claim in their motion for summary judgment and Webb's facts are "uncontroverted" by any evidence presented by the defendants raises the question of whether summary judgment on this claim in Webb's favor would be appropriate. The Court declines to make such a ruling at this point.

and investigation of his guilt. The deputies are also accused of providing false, misleading, or incomplete information to the prosecutor and making false, misleading, or incomplete statements in official proceedings and in court.

Defendants assert that they were legally authorized to arrest Webb, citing Nevada Revised Statute (NRS) 171.124 and Carson City Municipal Code (CCMC) 8.04.050. The statute cited by Defendants provides that it is proper for an officer to make a warrantless arrest when the arrested person commits a felony or a gross misdemeanor in the officer's presence; when the person arrested has committed a felony or gross misdemeanor, although not in the presence of the officer; and, when the officer knows a felony or gross misdemeanor has been committed and the officer reasonably believes the person arrested committed the offense. Finally, the statute permits a warrantless arrest at night if the officer has reasonable cause to believe the person arrested has committed a felony or gross misdemeanor, even if it is later shown that no felony or gross misdemeanor was committed.

Defendants also argue that Webb is unable to state a prima facie case for false arrest or imprisonment, noting that in order to proceed on a § 1983 action for this violation, the plaintiff must meet the state law elements of the tort. In Nevada, false arrest and false imprisonment are integrally related and require a showing "that the person [was] restrained of his liberty under the probable imminence of force without any legal cause or justification." *Marschall* v. *City of Carson,* 464 P.2d 494, 497 (1970). They argue that Webb cannot show he was arrested without legal justification because Webb matched the description of the individual being pursued in the vehicle and foot chase (except for his clothing) and that he was found running and hiding in the area where the driver was last seen.

According to the answers to interrogatories provided by defendant Sloan, Webb was not wearing the same clothes as the suspect, but since he was carrying a bag, it was possible he changed clothes. They declare that under these circumstances, it was reasonable for the deputies to arrest Webb.

Webb contests these alleged facts. He asserts that he was not running from the officers, in fact he did not run at all. He alleges he was walking in the area waiting for a money wire to arrive so he could get a room for the night when a resident in the area flagged down a police car, pointing in Webb's direction and shouting, "There's a black man!" Webb further asserts that even when the officer emerged from her vehicle and looked directly at him, she did not direct him to stop. Webb contends that even though the officer appeared to have no interest in stopping him, he was uncomfortable and continued to leave the area at a "fast walk" because "when [a] White Woman is yelling 'there's a Black Man' you don't stick around even if you've done nothing wrong."[3] According to Webb's sworn statement and testimony at the criminal trial (provided by Defendants with their reply) once Webb rounded the corner of the building he observed six to eight officers with their guns drawn and laser lights on. Concluding that the situation was serious, even dangerous, Webb "ducked down behind the car." Testimony of Webb at trial, at 76-77. Furthermore, Webb testified at trial and in his sworn opposition that as soon as he was contacted by Deputy Guimont and directed to come out from behind the

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[3] Defendants characterize this observation as "conclusory and somewhat fanciful." Reply (Doc. 33) at -1. It is fairly safe to assume that counsel is not a black man. It seems unlikely, however, that he is completely unaware of sociological studies and countless news stories which indicate that men of color. particularly black men. are stopped and questioned by police. without good reason in a disproportionate number. Certainly, Webb's concern was not completely "fanciful."

vehicle he complied fully. Thereafter, he was handcuffed and placed under arrest. Webb states he asked the deputies several times why he was being arrested. The response was "shut up." He also contends that after he was handcuffed, but before he was placed in a police vehicle, Sgt. Moltz, the officer who had originally encountered Webb on the street, informed Deputy Guimont, "that isn't him." The arrest was completed in spite of this and Webb was transported to the jail and booked on only misdemeanor counts.

It should be noted that upon his arrest, no clothes were found in Webb's backpack. In fact, the contents of the pack, approximately thirty pounds of law books, also seem to militate against the reasonableness of Webb's arrest. According to the defendants, during the course of the foot chase through the neighborhood, at least three fences were jumped by the suspect and Deputy Sloan, who was in pursuit of the suspect. Logically, it would be extremely difficult for anyone to run and jump fences carrying a thirty pound pack and still evade the officers. Webb also contends that the original police report and dispatch tape did not include any reference to a black bag in the original suspect's possession. However, these reports and recordings are not before the Court to corroborate Webb's statement.

Additionally, according to the trial testimony provided with the reply, Webb was 34 years old at the time and wears glasses. Apparently, the true suspect, Freddie Little, is eighteen or nineteen and does not wear glasses. Thus, Webb matched the description of the suspect only because he was a black male. It is also of note that Defendants offer shifting theories as to why Webb was attempting to avoid the officers when he was arrested. In the motion, Defendants argue that Webb stated he was afraid that the officers were after him because of a temporary protective order placed against him by his girlfriend. In the defendants' reply they interpret his trial testimony to indicate he was avoiding the officers because he had just urinated on the side of a building. A review of that testimony

leaves the Court believing that Webb was concerned, *at the time trial*, that if he admitted to public urination he might "get in trouble."

Mere suspicion which arises from the defendant's presence in the vicinity of the crime does not constitute probable cause. *Block* v. *State,* 604 P.2d 338, 340 (Nev. 1979). Nor does flight in response to approaching police officers, in and of itself, constitute probable cause. *Id.* Taking the evidence and the allegations in a light most favorable to Webb, it is difficult to find the arrest lawful. A citizen's mere presence in the general vicinity of a suspect should not give rise to an obstructing charge. Webb swears that at no time did he refuse to obey an order given by the officers. He swears he was ducking behind the vehicle to avoid being caught in gun fire. He swears that he informed the officers he was not driving any vehicle at any time that day. Deputy Sloan's contention that Webb's presence distracted the deputies from the true suspect, thereby obstructing the performance of their lawful duties is preposterous; a conclusion supported by Webb's acquittal on that charge. Webb took no affirmative actions to obstruct the officers. He matched the description of the suspect only because he was the same race and gender. At least one officer believed Webb was not the true suspect and informed the defendants of that belief. And, apparently no officer was willing to commit to a reason for arresting Webb when he inquired. In all, because "[m]ere suspicion, common rumor, or even strong reason to suspect are not enough" to establish probable cause to arrest, *Henry* v. *United States,* 361 U.S. 98, 101 (1959), material questions exist as to whether this arrest was legally justified and reasonable.

Initiation and Pursuit of Prosecution Without Probable Cause

Webb contends that the defendants caused criminal charges to be lodged against him and that they assisted in the prosecution of those charges in the absence of probable cause.

He contends that throughout the entire episode, Defendants were aware that there was no legal basis for his arrest and detention, yet Deputies Sloan and Guimont arrested him on various misdemeanor charges and assisted in the prosecution of those charges. Defendants Banister and Carson City are alleged to be responsible as policy makers who permitted a prosecution for an improper "retaliatory" purpose. This is essentially a claim of malicious prosecution.

In order to maintain a § 1983 claim for malicious prosecution, a plaintiff must demonstrate the elements of the tort under state law, as well as a resulting deprivation of constitutionally protected rights. *See Usher* v. *City of Los Angeles,* 828 F.2d 556, 561-562 (9th Cir. 1987); *Torres* v. *Superintendent of Police of Puerto Rico*, 893 F.2d 404, 409 (1st Cir. 1990). *See also Gowin* v. *Altmiller,* 663 F.2d 820, 823 (9th Cir. 1981). In Nevada, the *prima facie* elements of the tort of malicious prosecution are (1) a lack of probable cause, (2) malice, (3) favorable termination of the prior actions, and (4) damages. *Dutt* v. *Kremp,* 894 P.2d 354, 357 (1995). The defendants assert that the existence of probable cause is a question of law for the court to decide. The cases upon which they rely, however, consider the existence of probable cause in the context of a court's direct review of a criminal arrest. Conversely, the Ninth Circuit has determined that in civil cases, the existence of probable cause is a question for the jury. *McKenzie* v. *Lamb,* 738 F.2d 1005, I 1008 (9th Cir. 1984). They said:

> Our task in determining whether probable cause to arrest existed as a matter of law in [a] § 1983 action is slightly different from a similar determination in the context of a direct review of a criminal arrest. In the latter situation, we are called upon to review both law and fact and to draw the line as to what is and is not reasonable behavior. By contrast, in [a] § 1983 action the factual matters underlying the judgment of reasonableness

> generally mean that probable cause is a question for the jury, and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest.

Id., (citations omitted). The Seventh Circuit agrees, noting that while § 1983 claims presenting the question of probable cause are generally inappropriate for disposition on summary judgment, this is true only where there is room for a difference of opinion. *Llaguno* v. *Mingey,* 763 F.2d 1560, 1565 (7th Cir. 1985). Thus, only if there is no question of the underlying facts and a reasonable jury would have no difficulty determining the existence of probable cause should we grant summary judgment in favor of the defendants on this claim. With that in mind, we review the facts in evidence.

Whether a police officer had probable cause to arrest is ascertained by looking at the facts known to the officer at the time of the arrest and determining whether a reasonably prudent police officer could have believed that the suspect had committed or was committing an arrestable offense. *Beck* v. *Ohio*, 379 U.S. 89, 91(1964). Probable cause exists when, "under the totality of circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability" that a crime was committed. *United States* v. *Smith,* 790 F.2d 789, 792 (9th Cir. 1986). "Conclusive evidence of guilt is not necessary to establish probable cause. Mere suspicion, common rumor, or even strong reason to suspect are not enough. however." *McKenzie,* 738 F.2d at 1008 (citing *Henry* v. *United States,* 361 U.S. at 101).

As the discussion addressing the claim of unlawful seizure demonstrates, the circumstances surrounding Webb's arrest are in question. The defendants say Webb had reason to avoid them (either because he had a restraining order against him or because he had just urinated on a building), he fit the description of the suspect except for his clothes, and he was

hiding under a car, giving the deputies cause to arrest him. Defendants also contend that the independent determinations of probable cause made by the magistrate and the prosecuting attorney support denial of this claim. Conversely, Webb attests that when he was first confronted by Sgt. Moltz, she did not request that he stop or attempt to detain him in anyway. He testifies that he did not run from the police, but was hoping to stay out of the way of gun fire. Webb immediately complied with any orders or directives the deputies issued. Webb also points out that he only generally fit the suspect's description and that he was carrying a thirty-pound backpack, making it virtually impossible for him to have jumped three fences to elude the officers, especially without breaking a sweat. Finally, he notes that at least one officer believed that he was not the proper suspect and she informed the defendants of this belief. Webb also states in his opposition that the only reason the magistrate held him was because Webb had appeared in his courtroom less than one month before on a domestic matter. He also asserts that the magistrate "placed no legal judgment of Probable Cause within the Police Report," relying instead on Webb's previous court appearance as reason to hold him.

Defendants' argument regarding the independent judgment of the prosecutor is called into question based on the malicious prosecution and retaliation claims which arise almost solely due to the actions of the prosecutor. Thus, a proper finding of probable cause by the magistrate or the prosecutor is also in doubt. Because of the opposing evidence submitted, this is a question for the jury and summary judgment would be improper.

Qualified Immunity

Defendants next contend that they are entitled to qualified immunity because there was probable cause to arrest Webb. Alternatively, they submit that even if probable cause was not present, they should be entitled to immunity because "a

reasonable official, confronted with the specific facts at issue and the law in effect at the time," would have considered their actions to be proper, citing *Schertz* v. *Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989). Government officials performing discretionary functions are entitled to qualified immunity unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The relevant inquiry is whether a reasonable government official could have believed that his conduct was lawful, in light of clearly established law and the information he possessed. *Anderson* v. *Creighton*, 483 U.S. 635 (19S7); see *Wood* v. *Sunn*, 852 F.2d 1205 1209 (9th Cir. 1988). This is a fact-specific, objective test. *Anderson*, 483 U.S. at 641; *see Harlow*, 457 U.S. at 819. Because qualified immunity entitles government officials to "an immunity from suit rather than a mere defense to liability," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), it is essential that "insubstantial claims" be resolved as quickly as possible. *Anderson*, 483 U.S. at 639 n. 2; *Harlow*, 457 U.S. at 817-18. When available, entitlement to qualified immunity may be established as a matter of law by the district court on a motion to dismiss, for summary judgment, or for a directed verdict *Thorsted* v. *Kelly*, 858 F.2d 571, 575 (9th Cir. 1988).

Thus, the question to be answered by us is: Would a reasonable officer in the defendants' place, with the information they had, believe that probable cause to arrest Webb was manifest? This determination may be made on summary judgment if there are no genuinely disputed material factual issues resolution of which is necessary to determine qualified immunity. *Act Up!/Portland* v. *Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). However, if a genuine issue of fact exists preventing a determination of qualified immunity at summary judgment, the case must proceed to trial. *Id.* Accordingly, the court noted that two categories of factual issues exist which may preclude a determination of qualified immunity on summary judgment. First, in order to determine the existence of probable cause,

inquiry must be made into the facts and circumstances known to the officers at the time. *See. e.g, United States* v. *Greene*, 783 F.2d 1364, 1367 (9th Cir.), cert. denied, 476 U.S. 1185 (1986). If disputes regarding the facts material to this determination are present and genuine, it is for the fact finder. *ActUp!/Portland,* 988 F.2d at 873. Second, the court said:

> the determination of what conduct underlies the alleged violation--what the officer and claimant did or failed to do--is a determination of fact. We hold, however, that the determination of whether those facts support an objective belief that probable cause or reasonable suspicion existed is ordinarily a question for the court. It is not in itself a factual issue that can preclude summary judgment .... Of course, if the facts alleged by the defendant officer could not support a reasonable belief that his conduct was lawful, he is not entitles to qualified immunity.

Id. (footnote omitted).

In this instance, only sparse facts are presented about what the defendants knew when they decided to arrest Webb. No evidence is presented regarding Guimont's knowledge on that night. We do know what Webb believes the deputy knew-that Webb "isn't the one." Neither do we have before us any reports filed by the deputies in support of the arrest. Webb's sworn statement raises a number of questions that are material to a determination of the reasonableness of the deputies' actions under the circumstances. Such evidence would necessarily need to be presented in order to male an accurate determination. The absence of these facts is sufficient to preclude us from granting qualified immunity, however, we shall also address the second test.

As noted, we may also consider what the parties did during the course of events leading to Webb's arrest. Much

remains at issue on this point, as revealed in the previous discussion of probable cause. In reviewing what the deputies relied on to find probable cause, it seems significant that defendant Sloan states in his interrogatory responses:

> Subject David Webb was obstructing or delaying a peace officer by running/hiding from officers according to citizens reporting his activity. Subject David Webb stated he was running from me/officers. Subject David Webb *drew our attention away from the initial incident* . . . . David obstructed me [and] the other officers in the areas *by bringing our attention [to] him and not the suspect (driver) of the foot chase.*

Motion to Dismiss/Summary Judgment at 3, as summarized from Exhibit A. The contention that a citizen was obstructing an officer in his duties because his presence drew the officers' attention away from the real suspect is a misapplication of the ordinance under which Webb was arrested. That ordinance states:

> It is unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay, or molest any city officer or member of the sheriffs office or fire department of Carson City in the discharge of his official duties.

CCMC 8.04.050. Certainly this ordinance is designed to address affirmative or purposeful actions taken by individuals which would result in an obstruction of duty. Mere presence, even being crouched behind a car, cannot be said to be an affirmative act designed to hinder or delay an officer. Additionally, it is not clear from the evidence presented that the man whom citizens were making reports about was actually Webb. Since the officers did not know where their suspect was, it is entirely possible the reports were about the suspect, Freddie Little, and not about Webb. In any event, sufficient questions

remain and material facts are disputed by the parties to an extent that precludes granting Defendants qualified immunity.

Municipal Liability

In his fourth claim for relief and throughout the body of the complaint, Webb alleges that persons in policymaking positions, particularly Sheriff Banister and Chief Criminal Deputy District Attorney Anne Langer, contributed to the constitutional violations against him. Webb alleges the sheriff had a custom, practice, or policy of failing to train his deputies sufficiently to prevent them from wrongfully arresting and detaining citizens without probable cause, filing false or misleading police reports, giving false statements and testimony in court, or allowing innocent persons to remain in jail and thereafter participating in the wrongful prosecution of those they know to be innocent of the charged offenses. Carson City is alleged to have approved or ratified this policy and practice.

Banister is named as a defendant in his official capacity. Official capacity actions generally represent another way "of suing an entity of which an officer is an agent." *Kentucky* v. *Graham,* 473 U. S. 159,165 (1984), *quoting Monell* v. *New York City Dept of Social Services,* 436 U.S. 658, 690 n. 55, (1978). Thus, Banister is being sued as a agent of Carson City. A local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents under a theory of *respondeat superior.* Only when the action that results in the injury is taken pursuant to the government's policy or custom, whether resulting from legislative action or the words and deeds of persons who "may fairly be said to represent official policy," is the government as an entity responsible under § 1983. *Monell* v. *Department of Social Services of City of New York,* 436 U.S. 658, 694 (1978). Indeed, "local governments, like every other § 1983 'person,' may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such

custom has not received formal approval through the government's official decision-making channels." *Id.* at 669.

Webb's claim against Sheriff Banister and Carson City is based on an alleged failure to train the deputies which exhibits a deliberate indifference to the safety and security of citizens. Under the rule of *City of Canton, Ohio* v. *Harris,* 489 U.S. 378 (1989), "the inadequacy of police training may serve as the basis for a § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. The question is not whether the Sheriff and the City are responsible for the deputies training, but rather, whether that training is adequate; and if inadequate training is found, does it represent city policy. *Id.* This question of deliberate indifference turns on whether, in light of the duties performed by the deputies, the need for more training is obvious and the lack of training is likely to result in the deprivation of citizens' constitutional rights. *Id.*

Defendants argue that this claim fails because no constitutional violation has occurred against Webb, and thus the deputies' training cannot be said to be deficient. As the discussion above reveals, material questions remain which foreclose the Court from drawing such a conclusion. Defendants also contend that Webb has offered no evidence to support this allegation and that the deputies attendance at the Police Officers Standard Training (POST) program rebuts the contention.

In his opposition, Webb does not directly address a policy or custom. He sets out the time line of events that seems to show the officers knew or should have known at the time of his arrest that they did not have sufficient probable cause to arrest. He further notes, that over the course of the next several days, they received more information that pointed to another suspect. Webb suggests the deputies should have behaved differently, however, he does not tie these events to others which might also evidence an "obvious" lack of training on the

part of Carson City deputies. His complaint makes a bald assertion which he does not support further with facts. Therefore, summary judgment on the failure to train claim is appropriate, and Sheriff Barrister should be dismissed from the action.

Carson City is also alleged to have approved or ratified the decision of policymaker Anne Langer to prosecute persons that she knows "or reasonably should have known" are innocent. The City is alleged to have ratified Lancer's practice of punishing, by means of unjustified or malicious prosecution, innocent persons who refuse to waive their constitutional rights to seek redress for wrongs inflicted by the government. Webb claims the City should be liable for the actions taken by policymaker Ann Langer, Chief Criminal Deputy District Attorney.[4] Webb alleges it was Langer's decision to pursue the obstruction charge, even in the face of evidence showing he was improperly arrested and charged as the suspect in the vehicle chase. Specifically, Ms. Langer was the official who pursued the prosecution after Webb refused her "deal." Ms. Langer is alleged to have improperly attempted to get Webb to waive his constitutional rights in exchange for dismissing the charges.

Initially we must determine whether Ms. Langer, as Chief Criminal Deputy District Attorney, is indeed a policymaker so as to bind Carson City by her actions. Whether an official has policy making authority is a matter of state law. *Pembaur* v. *City of Cincinnati,* 475 U.S. 469, 481(1986)

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[4] Ms. Lamer enjoys absolute immunity as a prosecutor and presumably was not named a defendant in this action for that reason. *See Imbler* v. *Pachtman,* 424 U.S. 409, 427 (1976) ("We conclude that [prosecutors enjoy] the same absolute immunity under § 1983 that the prosecutor enjoys at common law"); *Ashelman v. Pope,* 793 F.2d 1072.1078 (9th Cir. 1986) (prosecutors are absolutely immune for quasi judicial activities taken within scope of their authority).

("Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law"). In Nevada, Chapter 252 of the Nevada Revised Statutes sets out the duties and authority of district attorneys. Specifically, subsection 070 states:

> 1. All district attorneys are authorized to appoint deputies, who may transact all official business appertaining to the offices, to the same extent as their principals.

NRS 252.070. Furthermore, it has been held that matters of prosecution are within the entire control of the district attorney. *Cairns* v. *Sheriff, Clark County,* 89 Nev. 113. 508 P.2d 1015 (1973); *Lane* v. *Second Judicial Dist., Washoe County,* 104 Nev. 427, 760 P.2d 1245 (1988). Therefore, since final authority on questions of prosecution lie with the district attorney, and deputy district attorneys have authority "to the same extent as their principals," Ms Langer has policy making authority as delegated to her by state law.

Second, we must determine if this particular decision can be construed to represent a policy, practice, or custom of the City. The Supreme Court has held that municipal liability may be imposed under § 1983 for a single decision made by policymakers under appropriate circumstances. *See Pembaur,* 475 U.S. at 480. The Court said:

> [A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by the government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More

> importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

Id. at 481. The Court took pains to note that municipal liability would not attach in all instances, but "only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* Langer, as prosecutor, has final authority in questions of prosecution. Her decision to condition Webb's prosecution on his willingness to waive a constitutional right represents policy and sets Carson City up as liable.

Finally, we must determine if Langer's decision resulted in a violation of Webb's constitutional rights. The Ninth Circuit has recognized in several different contexts that a state may not use its control over discretionary government benefits in a manner that places excessive burdens on certain constitutional rights. In *Vignolo* v. *Miller,* the court noted that under the doctrine of "unconstitutional conditions," even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *Vignolo Vignolo* v. *Miller,* 120 F.3d 1075, 1077 (9th Cir.1997).

> The government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not

> command directly." Such interference with constitutional rights is impermissible.

Id.,citing *Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972) (internal citation omitted). See also, *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994) (Dolan); *Nollan* v. *California Coastal Commission,* 483 U.S. 825 (1987); *Hyland* v. *Wonder,* 972 F.2d 1129 (9th Cir.1992), *cert. denied,* 508 U.S. 908 (1993); *Parks* v. *Watson,* 716 F.2d 646, 652-53 (9th Cir. 1983). In this instance, Langer offered to exercise her discretion in prosecuting Webb in exchange for a waiver of his First Amendment right to seek redress for wrongs inflicted by the government. Placing such unconstitutional conditions on Webb's freedom are clearly not permitted. Furthermore, Defendants have again failed to acknowledge that this claim has been made. As a result, summary judgment should not issue in their favor.[5]

Federal Conspiracy and Pendent State Law Claims

Webb raises a federal conspiracy claim against all defendants. He contends that the actions taken by the various defendants easily show an agreement among them, as well as actions taken by them, to interfere with his constitutional rights. This is a violation of 42 U.S.C. § 1985. Webb also raises a due process claim under the federal and state constitutions (Ninth Claim for Relief) which is not addressed by Defendants except as a pendent claim. Defendants mistakenly inform the Court that these and the remaining claims are state law causes of action. Additionally, Defendants mistakenly inform the Court

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[5] Here again arises the question of whether Webb should be granted sun summary judgment against defendants in view of the Court's power to *sua sponte* grant such relief. *See* note one, supra. At this time the Court shall not issue summary judgment for either party.

that Webb did not invoke the Court's pendent jurisdiction over the remaining claims. A quick review of the complaint exposes this error in Defendants' representation. Obviously, a federal conspiracy claim is not a state law tort; neither is a due. process claim raised under the Fourteenth Amendment to the United States Constitution. However, false arrest, abuse of process, malicious prosecution, and intentional infliction of emotional distress are state law torts. Because no argument was made in reference to the federal conspiracy or due process claims, they survives Defendants' motion.

Defendants argue that the state claims are barred by NRS 41.032(2) which provides that "no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the state or any of its agencies or political subdivisions which is: . . . (2) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused." NRS 41.0307 defines the following terms used in "NRS 41.031 to 41.039, inclusive:"

1. "Employee" includes an employee of -a part-time or full-time board, commission or similar body of the state or a political subdivision of the state which is created by law.

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4. "Public Officer" or "officer" includes:

(a) A member of a part-time or full-time board, commission or similar body of the state or a political subdivision of the state which is created by law.

(b) A public defender and any deputy or assistant attorney of a public defender.

This definition militates against the application of this statute to actions taken by police officers. Further, a review of the statute's legislative history indicates quite clearly that it was not the intent of the Nevada Legislature to provide discretionary immunity to the deputies. The statute to limit the state's waiver of Eleventh Amendment immunity was originally enacted in 1965. At the very next legislative session in 1967, it was amended to specifically remove from the statute's coverage claims against peace officers for false arrest. *See, Limitations on Actions Against the State, Political Subdivisions: Hearings on AB 274 Before the Committee on Judiciary,* 54th Session (1967) (statement of Assemblyman Torvinen)("This repeals the section [NRS 41.034] which says that no suit may be brought against any municipality or agency resulting from action of peace officer except for gross negligence.' It is primarily striking the section saying you cannot sue for false arrest. It is restoring that right. I would like to pass the bill out. It has merit"). According to the Committee Minutes of March 24, 1967, the motion passed unanimously. *Id.* The amendment to the statute passed the Nevada State Senate on April 7, 1967, and thereafter became law. *Statutes of Nevada,* 1967 at 993. It is also of particular note that all further legislative action taken in relation to the limitation of actions against the state addressed in this statute were specifically directed to acts by agencies, commissions, and other policy-making or regulatory boards. In 1983, amendments were made to address actions arising from citizens' right in real property. *Statutes of Nevada,* 1983 at 2100. Specifically, the amendment was designed to address actions taken by county planning commissions and the Tahoe Regional Planning Agency. In 1987, "immune contractors" language was added to provide indemnity for doctors and other medical professionals who contract to provide care at the state prisons. *Statutes of Nevada,* 1987. This was the result of a tort reform movement within the State Legislature.

Furthermore, because the discretionary function exception to the state's waiver of sovereign immunity is nearly

identical to that in the Federal Tort Claims Act, 28 U.S.C. § 2680(a), federal precedents are relevant to our interpretation. *Scott* v. *Department of Commerce,* 763 P.2d 341 (Nev. 1988). In analyzing the applicability of the discretionary function exception under the Federal Tort Claims Act, a two-part test is applied. *See, Miller* v. *US.,* 163 F.3d 591 (9th Cir. 1998). First, the exception covers only acts that are discretionary in nature; those necessarily involving an element of choice. *Blackburn* v. *United States,* 100 F.3d 1426,1429 (9th Cir.1996). The choice requirement is not satisfied where a statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the person has no rightful option but to adhere to the directive. *Berkovitz by Berkovitz* v. *U.S.*, 486 U.S. 531, 536 (1988). Second, once it is determined that discretion is involved, there must also be a finding that the discretion requires the type of judgment that the exception is designed to shield. *Id.* The exception protects only government actions and decisions based on, "social, economic, and political policy." *Id.* While, the decision need not be actually based on overt policy considerations, it must be susceptible to a policy analysis. *U.S.* v. *Gaubert,* 499 U.S. 315, 325 (1991); *Federal Deposit Ins.* Corp. v. *Craft,* 157 F.3d 697, 707 (9th Cir. 1998).

Defendants argue that the decision whether to arrest and prosecute Webb was discretionary. Applying the test used in *Miller, supra.,* this argument fails. The deputies' decision to arrest does not require consideration of basic social, economic, or political policy. The propriety of an arrest is closely guided by requirements set out in the United States Constitution, the Nevada State Constitution, the Nevada Revised Statutes, and almost assuredly by internal policies of the Carson City Sheriffs Office. These guides leave little room for officer discretion. Because of the clear legislative intent of set forth above when the Nevada Legislature enacted and amended NRS 41.032 as well as the consideration of the *Miller* factors, we conclude that the defendant deputies do not enjoy sovereign immunity. *Cf. Ortega* v. *Reyna,* 114 Nev. 55, 953 P.2d 18 (1998); *Maturi* v.

Las Vegas Metropolitan Police Dep't, 110 Nev. 307, 871 P.2d 932 (1994). The state law torts of false arrest, abuse of process, malicious prosecution, and intentional infliction of emotional distress shall not be dismissed.

CONCLUSION

Despite the form and nature of Webb's opposition to the defendants' motion to dismiss or alternatively motion for summary judgment, he raises sufficient questions of material fact to preclude summary judgment on all the federal claims except the allegation of failure to train against Sheriff Banister and Carson City. Further, the defendant deputies should not benefit from qualified immunity. Viewing the facts in a light most favorable to Webb, the basis for arresting and charging Webb is so tenuous that it precludes a any judicial determination that the officers could have reasonably thought their actions were legal and did not violate Webb's clearly establish rights.

Webb has not addressed the failure to train claim in his opposition to the motion for summary judgment. The allegations contained in the complaint are too conclusory and without any factual support to stand alone. Under the *Canton* v. *Harris* standard, "the need for more or different training must be so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent." *Id.*, 489 U.S. at 390.

In as much as Deputy District Attorney Langer is in a position to make and enforce policy within the criminal division of the prosecutor's office, her decision to offer an improper, even illegal deal to Webb can be said to represent the policy of Carson City, making the City answerable for the malicious and retaliatory prosecution charges. Moreover, since Defendants have not addressed the federal claims of retaliatory prosecution

and federal conspiracy relating to Langer's actions, summary judgment in their favor is not appropriate. Where no motion is made or evidence presented, this Court will not grant summary judgment.

Despite Defendants' counsel's apparent confusion about the invocation of pendent jurisdiction, the state law claims are rightfully before this Court. Argument that sovereign immunity forecloses this Courts' jurisdiction to hear them is not persuasive. The State's waiver of immunity as set forth in NRS 41.032(2) protects only discretionary acts that are based on social, economic or political policy considerations. The arrest of Webb, while requiring some judgment on the part of the deputies, is guided so closely by constitutional requirements, state statute, and presumably, internal policy as to make the action operational and not discretionary. These claims shall survive the motion as well.

IT IS THEREFORE **ORDERED** that Defendants' Motion to Dismiss or Alternatively for Summary Judgment (Doc. # 18) is GRANTED as to Webb's Fourth Cause of Action against Defendants Banister and Carson City for failure to train.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss or Alternatively for Summary Judgment (Doc. # 18) is DENIED as to all remaining causes of action.

IT IS FINALLY ORDERED that Defendant Banister is DISMISSED from the action.

Dated this 20 day of August, 1999.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX D

[jurats omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

DAVID Q. WEBB	) CV-N-97-673-ECR
vs.	) MINUTES OF THE COURT
DARRIN SLOAN, ROBERT GUIMONT, ROD BANISTER, and CARSON CITY.	) March 21, 2001

PRESENT: EDWARD C. REED, JR. - U.S. District Judge
Deputy Clerk: BRENDA L. GORBET
Reporter: NONE APPEARING
Counsel for Plaintiff: NONE APPEARING
Counsel for Defendant: NONE APPEARING

MINUTE ORDER IN CHAMBERS

This case arises out of the arrest of an adult male. The plaintiff has moved for partial summary judgment (#58). Defendants have opposed (#60) the motion. Plaintiff replied (#63). This motion is ripe for decision.

Background

We have set out the surrounding facts of this case in detail in our previous order dated August 20, 1999. Therefore, we have included only a general background of the case.

On June 27, 1997, Defendant Sloan observed a vehicle speeding in Carson City. Officer Sloan chased the vehicle into a parking lot where the driver of the vehicle ran away from the vehicle and jumped over a fence. Officer Sloan attempted to chase the individual but lost sight of him in a trailer park behind the Carson City Inn. He called for assistance and police officers set up a perimeter around the area. Officer Sloan did not get a clear view of the individual but did notice that he was a black adult male wearing dark pants and no shirt. Officer Sloan also states that the suspect carried a backpack. At this point, the officer returned to inspect the vehicle and then heard over the radio traffic that a black male was spotted running into Evergreen Center.

Earlier that same day, David Webb ("Webb") was served with a temporary protective order ("TPO") to vacate his shared room at the Carson City Inn. Webb alleges that he called his sister in Boston to borrow some money and to wire it to the Frontier Motel Convenience store. Webb vacated his room and went for a walk while he waited for the money. Webb wore a white shirt, dark pants, and carried a backpack. Webb states that during his walk he heard someone yell and he ducked behind a parked car. Deputy Guimont found Webb and asked him to stand up. Webb was questioned and then arrested once Officer Sloan arrived and identified him as the man he was chasing.

On July 3, 1997, an informant called the Sheriff's Department and said that Freddy Little was bragging about having escaped the cops. This information made Officer Sloan doubt whether plaintiff was the individual he had chased. Officer Sloan contacted the Deputy District Attorney Melanie Bruketta and appraised her of the new information. Webb was released from jail. The charges against plaintiff were eventually dropped. Plaintiff has filed a complaint alleging violation of his First Amendment right, false arrest, false imprisonment, malicious prosecution, failure to train, and conspiracy.

I. Analysis

A. Section 1983-False Arrest

Under section 1983 "[e]very person who, under color of [state law], . . . [deprives] any citizen of the United States . . of any rights, privileges; or immunities secured by the Constitution and laws, shall be liable to the party injured. . ." 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution prohibits arrest without probable cause. Arrests without probable cause thus give rise to a cause of action for damages. *McKenzie* v. *Lamb*, 738 P.2d 1005, 1006 (9th Cir. 1984). "In a [section] 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest." *Id.* at 1008.

In determining whether the officers did or did not have probable cause the court must look at "some objective evidence which would allow a reasonable officer to deduce that a particular individual has committed or is in the process of committing a criminal offense." *Id.* (citing *Beck* v. *Ohio*, 379 U.S. 89, 90-91 (1964)). "Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in' themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested." *Dunaway* v. *New York*, 442 U.S. 200, 208 n.9 (1979). Viewing all the facts in the light most favorable to the defendants, we find that genuine issues of material fact exist for trial.

Plaintiff alleges that the officers knew the following before they arrested him: that they were looking for a black male, aged eighteen to nineteen, that the individual was shirtless but wore dark pants and was carrying a backpack, that this male

was the driver and sole occupant of the vehicle, and that the suspect's name was Freddy Little. The plaintiff claims that although he was carrying a backpack it was very heavy so he could not have been on the run, he was 34 years old at the time of his arrest and could not have been confused for a teenager, and the officer's knew his name was not Freddy Little because he had a TRO in his backpack that identified him as Daniel Webb.

However, a review of the evidence shows that these facts are in dispute. Deputy Sloan's testimony reveals that he knew the following about the suspect he was chasing: the suspect was a black male adult who did not have a shirt on, wore dark pants and carried a black backpack. (Plaintiff's Motion, Ex. 1, p. 8) The suspect jumped a fence into a trailer park right behind the Carson City Inn. It is not clear that the officers knew who the suspect was or the age of the suspect. Deputy Sloan testified that he did not get a very clear view of the suspect because the suspect was running away from him. The plaintiff was stopped and arrested because he wore dark pants, had a backpack, and was in the vicinity of the Carson City Inn. Furthermore, plaintiff hid from the police officers under a vehicle. We find that under this set of facts and circumstances a reasonable jury could find that the officers had probable cause to arrest plaintiff. Therefore, we deny the plaintiff's motion for summary judgment on his federal and state false arrest claim.

B. False Imprisonment

"'To establish false imprisonment of which false arrest is an integral part, it is . . necessary to prove that the [plaintiff was] restrained of his liberty under the probable imminence of force without any legal cause or justification.'" *Hernandez* v. *City of Reno*, 97 Nev. 429, 433, 634 P.2d 668 (1981) (quoting *Marschall* v. *City of Carson*, 86 Nev. 107, 110, 464 P.2d 494 (1970)). The plaintiff bears the burden of proving that the delay following his arrest was unlawful. "'A few hours may

constitute an unnecessary delay; whether the defendant proceeded with due diligence depends on the circumstances of the particular case.'" *Yada* v. *Simpson*, 112 Nev. 254, 255 (1996) (quoting *Nelson* v. *City of Las Vegas*, 99 Nev. 548, 554 (1983)). The plaintiff alleges that he was unreasonably detained in jail for a prolonged period of time after the officers and district attorney knew that he was not the suspect Officer Sloan had chased. The defendants' have produced evidence contradicting the plaintiff and showing that the Carson City District Attorney's office acted swiftly in bringing plaintiff before a magistrate and also in releasing plaintiff once Officer Sloan was no longer sure that plaintiff was the suspect he had chased. (Defendants' Opposition, Ex. A, Affidavit of Melanie Bruketta). Therefore, we find that a genuine issue of material fact exists as to whether plaintiff was falsely imprisoned.

C. Malicious Prosecution

The following elements must be proved in a malicious prosecution action: (1) a lack of probable cause to commence the prior action; (2) malice; (3) favorable termination of the prior action; and (4) damages. *Dutt* v. *Kremp*, 111 Nev. 567, 571 (1995). When there is no dispute concerning the facts upon which an attorney acted in filing the prior action, the question of whether there was probable cause to institute the prior action is purely a legal question to be answered by the court. *Bonamy* v. *Zenoff*, 77 Nev. 250, 252 (1961). We find that in this case the facts are in dispute and that a jury should be given the opportunity to find the facts, after which the court will make the legal determination of probable cause to commence the action.

D. First Amendment-Overbroad Statute

The plaintiff also seeks summary judgment on his First Amendment Claim. The plaintiff argues that Carson City Municipal Code 8.04.050 ("CCMC") is unconstitutional because it is vague or overbroad on its face and prohibits more

speech than necessary. Carson City's Municipal Code 8.04.050 provides that:

> [i]t is unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay or molest any city officer or member of the sheriff's office or fire department of Carson City in the discharge of his official duties.

The plaintiff relies on *City of Houston* v. *Hill*, 482 U.S. 451 (1987) for his argument. In *Hill*, the Court held that the City of Houston's ordinance was unconstitutionally overbroad under the First Amendment. In that case, the City of Houston had enacted the following ordinance:

> It shall-be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.

First, the Court held that the "enforceable portion of the ordinance deals not with the core criminal conduct, but with speech. As the city has conceded, the language in the ordinance making it unlawful for any person to 'assault' or 'strike' a. police officer is preempted by the Texas Penal Code . . ." *Id.* at 460. The Court, therefore, found that the enforceable portion of the statute prohibited verbal interruptions of police officers. *Id.* at 461. The Court noted that the First Amendment protects a significant amount of verbal criticism and challenges directed at police officers. *Id.* Plaintiff argues that Carson City's ordinance has the same problems that the city of Houston's ordinance contained in *Hill*. The plaintiff overlooks some key distinctions.

Central to the Court's decision in *Hill* was the fact that state law preempted coverage of physical acts, leaving an ordinance that prohibited verbal interruptions of police officers.

The Court stated that the "enforceable portion of the ordinance deals not with core criminal conduct, but with speech."

Carson City's Municipal Code is different. It applies to one who may "hinder, obstruct, resist, delay [or] molest." We also note that plaintiff makes no empirical showing that the ordinance covers cases involving verbal communications that are protected by the First Amendment. In contrast, in *Hill*, Hill introduced extensive evidence of the unconstitutional application of the ordinance to protected speech. Furthermore, an evaluation that a statute is vague implies that "men of common intelligence must necessarily guess at its meaning . . . ." *Connally* v. *General Const. Co.*, 269 U.S. 385 (1926). "Words inevitably contain germs of uncertainty . . . ." *Broadrick* v. *Oklahoma*, 413 U.S. at 608. However, words are to be given their ordinarily understood meaning. We question whether an individual evaluating this statute to determine the conduct proscribed would conclude that it was directed to or substantially encompassed speech as opposed to conduct.

Only a statute that is substantially overbroad may be invalidated on its face. *New York* v. *Ferber*, 458 U.S. 747, 769 (1982). A statute will not be held invalid simply because it "is possible to conceive of a single impermissible application." *Id.* We do not view Carson City's Municipal Code 8.04.050 as reaching a substantial amount of protected conduct, therefore we do not find it overbroad.

E. Section 1983-custom policy or practice

The plaintiff also moved for summary judgment on his section 1983 claim against Carson City. The plaintiff claims that the City had a custom, policy or practice of falsely imprisoning or maliciously prosecuting citizens. Plaintiff argues that CCMC 8.04.050 is the official policy or custom. We have determined that CCMC 8.04.050 is not unconstitutional.

Therefore, Carson City does not have a custom, policy or practice of depriving individuals of their rights.

F. Section 1983-offer to dismiss in exchange for a release of civil liability.

Plaintiff alleges that the Deputy District Attorney's offer to dismiss the obstruction charge if he signed a waiver relinquishing his right to sue the defendants violated his First Amendment right to petition the government for redress of his grievances. First, an agreement to dismiss criminal charges in exchange for a release of civil liability is enforceable and does not violate public policy, even a section 1983 action. *Newton* v. *Rumery*, 480 U.S. 386 (1987). So on its face, the Deputy District Attorney's offer did not violate any of plaintiff's rights. Second, we note that plaintiff was not prevented from seeking redress against the defendants. Plaintiff has filed this suit. Therefore, plaintiff was not stopped from exercising any of his rights under the First Amendment.

Conclusion

We find that the facts in this case are in dispute and that defendants' have produced sufficient evidence to create a genuine issue of material fact as to plaintiff's claims for false arrest, false imprisonment, and malicious prosecution. We also find that Carson City's Municipal code 8.04.050 is not unconstitutional.

IT IS THEREFORE HEREBY ORDERED THAT plaintiff's motion for summary judgment is **DENIED**.

LANCE S. WILSON, CLERK

By: /s/
Deputy Clerk

APPENDIX E

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Nevada Revised Statutes:

NRS 246.030 Deputies.

1. All county clerks are authorized to appoint deputies, who are authorized to transact all official business appertaining to the office to the same extent as their principals. A deputy must be at least 18 years of age.

2. County clerks are responsible on their official bonds for all official malfeasance or nonfeasance of their deputies. Bonds for the faithful performance of their official duties may be required of deputies by county clerks.

3. All appointments of deputies under the provisions of this section must be in writing, and must, together with the oath of office of the deputies, be recorded in the office of the recorder of the county within which the

principal legally holds and exercises his office. Revocations of such appointments must be recorded in the same manner. From the time of the recording of the appointments or revocations, persons shall be deemed to have notice of the appointment or revocation.

NRS 247.040 Deputies.

1. All county recorders are authorized to appoint deputies, who are authorized to transact all official business appertaining to the office to the same extent as their principals. A deputy must be at least 18 years of age.

2. County recorders are responsible on their official bonds for all official malfeasance or nonfeasance of their deputies. Bonds for the faithful performance of their official duties may be required of deputies by county recorders.

3. All appointments of deputies under the provisions of this section must be in writing, and must, together with the oath of office of the deputies, be recorded in the office of the recorder of the county within which the county recorder legally holds office. Revocations of such appointments must be recorded in the same manner. From the time of the recording of the appointments or revocations, persons shall be deemed to have notice of the appointment or revocation.

NRS 248.040 Appointment and removal of deputies.

1. Except as provided in NRS 248.045, each sheriff may:

   (a) Appoint, in writing signed by him, one or more deputies, who may perform all the duties devolving on the sheriff of the county.

(b) Except as otherwise provided in this paragraph, only remove a deputy who has completed a probationary period of 12 months for cause. A deputy who functions as the head of a department or an administrative employee or who has not completed the probationary period may be removed at the sheriff's pleasure.

2. No deputy sheriff is qualified to act as such unless he has taken an oath to discharge the duties of the office faithfully and impartially. The oath must be certified on the back of his appointment and filed in the office of the county auditor.

3. The sheriff may require of his deputies such bonds as to him seem proper.

NRS 250.060 Deputies.

1. All county assessors are authorized to appoint deputies, who are authorized to transact all official business relating to the offices to the same extent as the county assessors. A deputy must be at least 18 years of age.

2. County assessors are responsible on their official bonds for all official malfeasance or nonfeasance of their deputies. Bonds for the faithful performance of their official duties may be required of deputies by county assessors.

3. All appointments of deputies under the provisions of this section must be in writing, and must, together with the oath of office of the deputies, be recorded in the office of the recorder of the county within which the county assessor legally holds and exercises his office. Revocations of such appointments must also be recorded as provided in this section. From the time of the

recording of the appointments or revocations therein, persons shall be deemed to have notice of the appointments or revocations.

NRS 252.070 Deputies; clerical, investigational and operational staff.

1. All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals.

2. District attorneys are responsible on their official bonds for all official malfeasance or nonfeasance of the deputies. Bonds for the faithful performance of their official duties may be required of deputies by district attorneys.

3. All appointments of deputies under the provisions of this section must be in writing, and must, together with the oath of office of the deputies, be recorded in the office of the recorder of the county within which the district attorney legally holds and exercises his office. Revocations of those appointments must also be recorded as provided in this section. From the time of the recording of the appointments or revocations therein, persons shall be deemed to have notice of the appointments or revocations.

4. Deputy district attorneys of counties whose population is less than 100,000 may engage in the private practice of law. In any other county, except as otherwise provided in NRS 7.065 and this subsection, deputy district attorneys shall not engage in the private practice of law. An attorney appointed to prosecute a person for a limited duration with limited jurisdiction may engage in private practice which does not present a conflict with his appointment.

5. Any district attorney may, subject to the approval of the board of county commissioners, appoint such clerical, investigational and operational staff as the execution of duties and the operation of his office may require. The compensation of any person so appointed must be fixed by the board of county commissioners.

6. In a county whose population is 400,000 or more, deputies are governed by the merit personnel system of the county.

NRS 252.080 Public prosecutor.

The district attorney in each county shall be public prosecutor therein.

NRS 252.090 Attendance of courts in county.

The district attorney shall:

1. Attend the district courts held in his county, for the transaction of criminal business.

2. Attend justices' courts in his county, when required by justices of the peace, and conduct all prosecutions on behalf of the people for public offenses.

NRS 252.110 Duties. The district attorney shall:

1. Draw all indictments, when required by the grand jury.

2. Defend all suits brought against his county.

3. Prosecute all recognizances forfeited in the district court and all actions for the recovery of debts, fines, penalties and forfeitures accruing to his county.

4. Except with respect to matters for which the board of trustees of the school district has employed private counsel, draw all legal papers, give his written opinion when required on matters relating to the duties of the board of trustees and transact the legal business of the school district whose boundaries are conterminous with the boundaries of his county, and perform such other legal duties as may be required of him by the board of trustees.

5. Bring all actions on behalf of the county for abatement of nuisances pursuant to order of the board of county commissioners or, in the discretion of the district attorney, pursuant to an ordinance of the county as provided by NRS 244.360, subsection 6, including actions for injunction, as well as for recovery of compensatory and exemplary damages and costs of suit.

6. Perform such other duties as may be required of him by law.